Supreme Court, U.S.
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No. 85-1323 (3)

IN THE
Supreme Court of the United States

GEORGE D. KING,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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Respondents err in asserting that there is no important undecided question. In *Curtis v. Loether,* 415 U.S. 189 (1974) this court noted that it had **not** decided whether a jury trial right was determined by relief requested at the commencement of suit or relief available at the time of trial.

> The Court of Appeals concluded that the right to a jury trial was properly tested by the relief sought in the complaint and not by the claims remaining at the time of trial. 467 F.2d, at 1118-1119. We need express no view on this question."

Curtis v. Loether, supra at 196 n.11. That issue is now presented to this court.

I. IF THE COURT DID NOT CONVERT THE ACTION FROM AT LAW TO EQUITY, THEN IT REMAINED AT LAW AND A JURY TRIAL WAS CONSTITUTIONALLY REQUIRED.

Respondents state the judge did not convert the action at law to a suit in equity, "when it granted summary judgment on all damages claims, it concluded that plaintiff no longer had a right to a jury trial.. There was no 'conversion' of petitioner's action" Respondents Brief at 7.

If the suit was not converted, then it remained an action at law and under the Seventh Amendment the jury right had to be preserved:

> **In Suits at common law... the right of trial by jury shall be preserved ...**

The role of a jury is to find facts: it is not limited to a mathematical role of computing damages. Liability is the crucial issue. Whether the judge or jury determines the extent of damages is far less important than the issue of who determines whether there was an abuse of power.

Could plaintiff deprive the defendant of its right to a jury trial on liability merely by omitting a damages prayer ?

If state university professors who have tenure have no remedy at law, then they should clearly be entitled to temporary restraining orders and preliminary injunctions because the major criteria of 'no adequate remedy at law' will readily be met. In this case, Petitioner's motion for preliminary injunction was denied, in part, because the court ruled that plaintiff had an adequate remedy at law. Then the court denied the remedy at law.

CAUSATION IS NOT BROKEN BY THE FINAL DECISION-MAKERS.

Since the filing of this petition, this court has decided a case which clearly exposes the error of the trial court in its dismissal of damages with the ultimate effect of the jury being stricken. In *Briggs v. Malley,* 54 U.S.L.W. 4243 (March 5, 1986), this court recognized that the "District court's 'no causation' rationale is inconsistent with our interpretation of § 1983." *Briggs v. Malley, supra* at 4245-46 n.7 (March 5, 1986). The damages dismissal against Respondent Lukermann herein was predicated on the same rationale used by the District Court in *Briggs* i.e., the lack of causation. Since the issue of a

jury trial was premised on a wrong rationale, this alone warrants reversal.

Respondents assert that the board's decision favorable to petitioner was precipitated by "new" affidavits submitted on behalf of petitioner. These affidavits did not contain new information. They contained 2 page summaries of a voluminous transcript. For example, one of the Respondents' key witnesses, Geneva Southall, had summarized her testimony about the administration's obsession with getting rid of Petitioner and explained a prior departmental vote:

> "The administration repeatedly characterized Professor King as the problem hindering departmental progress. This attitude led the department to vote to take him out of the department and let his skills be used elsewhere in the University community. I never intended the vote to be viewed as a request for his removal from the University. It was the only way the department could get onto other business." (emphasis in original affidavitt)

Respondents ignore recent decisions of this court which clarified the abuse of power protection afforded by the due process clause. The 14th Amendment contains a "substantive component, sometimes referred to as 'substantive due process', which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' Ante, at 5" See Concurring opinion, J. Stevens, *Daniels v. Williams,* 54 U.S.L.W. 4090,93 (1-21-86).

This court has afforded the protection of substantive due process to the interest of a tenured teacher whose employment

was terminated, See Concurring opinion of J. Powell in *Regents of the University of Michigan v. Ewing*, 54 U.S.L.W. 4055, 4059 (12-12-85) citing Cf. *Harrah Independent School District v. Martin,* 440 U.S. 194 (1978). Respondents attempt to sidestep the substantive component. Petitioner, as a tenured full professor, had a right to a jury trial on the issue of whether the Respondents' actions in taking away his property were arbitrary or an abuse of power, regardless of the procedures. "Historically, the guarantee of due process has been applied to **deliberate** decisions of government officials to deprive a person of ... property." *Daniels v. Williams*, 54 U.S.L.W. 4090,91 (1-21-86). The mobilization of faculty to seek reversal of the Board's decision favorable to Petitioner was clearly a deliberate act. The political pressure negated any procedural due process and raised the fact question of abuse of power.

II. DIRECTED VERDICT STANDARD IS NOT PROPER FOR A COURT TRIAL.

Respondents' position that the "evidence presented was not strong enough to overcome a directed verdict motion if a jury had been empanelled" is itself refuted by the trial court's decision not to grant their motion. Whether there was sufficient evidence for a factual dispute is a **threshold** question. Once, the federal court had decided that there were questions of fact, by its decision to deny Respondents' motion for dismissal, reexamination of the threshold question is foreclosed. It is further negated by the trial court's decision on the merits, rather

than under Rule 41 (b). At no time did the trial court determine that there were no material fact questions on the issue of liability. Defendants have tried to reverse the effect of the trial court's decision on the merits and convert it into a Rule 41 dismissal. The rule provides that "a dismissal under this subdivision [Rule 41 (b)] ...operates as an adjudication upon the merits." The District Court did not dismiss plaintiff's complaint. It ruled on the merits. Defendants attempt to convert the court's decision on the merits into a Rule 41 dismissal, in effect a nonsuit. Such sophism cannot be used to retroactively justify the denial of a jury trial.

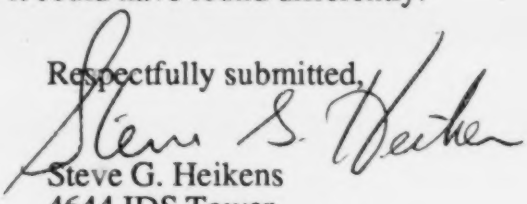
Any good trial attorney knows that cases are tried differently when it is to the court rather than to a jury. *Hildebrand v. Board of Trustees of the State Univeristy of Michigan*, 607 F. 2d 705, 710 (6th Cir. 1979). It was incorrect to apply a directed verdict standard when trial was to the court.

CONCLUSION

The denial of a jury was based on an erroneous premise-lack of causation. Nevertheless, the Constitutional right to have a jury decide a question of the abuse of power should not be determined solely by whether damages claims remain at trial. Such a principle is inconsistent with prior decisions of this court and would deny the essence of a jury -- to decide the real issue, liability. Was there an abuse of power?

Denial of a jury must be tested by the threshold issues--whether the court recognized that material fact questions existed, not whether it could have found differently.

Respectfully submitted,



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